



Decision and statement of Reasons of the First Tier Tribunal (Housing and Property Chamber)

Under Rule 8 of the First Tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ‘the Rules’.

In respect of application by Ms Suzanne Kyle in terms of Rule 109 of the Rules.

Case reference FTS/HPC/EV/19/2820

At Glasgow on the 11 November 2019, Lesley Anne Ward, legal member of the First –Tier Tribunal ‘the Tribunal’ with delegated powers of the Chamber President, rejected the above application in terms of Rule 8(1)(a) and (c) of the Rules.

1. This is an application made by Ms Suzanne Kyle, the owner and landlord of the property at 5 Lintburn Street Galashiels TD1 1HP ‘the property’, for recovery of possession of the property in terms of Rule 109 of the rules.
2. The applicant thereafter instructed JB Lettings Ltd to act as her representatives in this matter.
3. The application was accompanied by the following:-
 1. Model Private Residential Tenancy agreement for let of the property from 18 December 2018.
 2. Notice to leave dated 24 June 2019.
 3. S11 notice.
 4. Rent statement
 5. Certificate of service of the notice to leave by sheriff officer.
4. The tribunal wrote to the applicant’s representative on 16 October 2019 asking for the following:

We note that the Sheriff Officer execution of service shows that the notice to Leave was served on the tenant on 28 June 2019. The Notice to Leave was signed 24 June and at Part 4 specifies a date of 25 July 2019. This does not provide the necessary 28 day period in terms of section 54 of the Private Housing (Tenancies) Scotland Act 2016. Please clarify the legal basis upon which you consider the Notice to Leave to be competent in this regard?

5. The applicant's representative responded on 1 November 2019 by stating that she had followed the guidance issued by the Scottish Association of Landlords. She did not provide any other legal argument regarding the validity of the notice to leave.
6. The application is seeking to recover the property on ground 12 on the basis of rent arrears over three consecutive months.
7. There is a fundamental problem with this application which relates to the notice to leave. I have considered the notice to leave carefully and considered whether the notice to quit meets the legal requirements of such a notice. I consider that the notice to leave issued here is invalid. Section 54 of the Private Housing (Tenancies)(Scotland) Act 2016, 'the Act' provides:

54 Restriction on applying during the notice period

(1)A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2)The relevant period in relation to a notice to leave—

(a)begins on the day the tenant receives the notice to leave from the landlord, and

(b)expires on the day falling—

(i)28 days after it begins if subsection (3) applies,

(ii)84 days after it begins if subsection (3) does not apply.

(3)This subsection applies if—

(a)on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months, or

(b)the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

(i)that the tenant is not occupying the let property as the tenant's home,

(ii)that the tenant has failed to comply with an obligation under the tenancy,

(iii)that the tenant has been in rent arrears for three or more consecutive months,

(iv)that the tenant has a relevant conviction,

(v)that the tenant has engaged in relevant anti-social behaviour,

(vi) that the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social behaviour.

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

8. In terms of s54 of the Act, 28 days' notice is required to be given to a tenant where possession is sought on ground 12. The notice to leave here is dated 24 June 2019 and states that an application will not be submitted to the tribunal until 25 July 2019.

9. Further, s62(1) of the Act provides:

62 Meaning of notice to leave and stated eviction ground

(1) References in this Part to a notice to leave are to a notice which—

(a) is in writing,

(b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,

(c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and

(d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3) References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

10. S 62(b) requires that the notice to leave should specify the day on which the landlord expects to become entitled to make an application to the tribunal and s62(4) provides that the 'day' specified is the day falling after the day on which the notice period defined in s54(2) will expire. S 62(5) of the Act states that for the purposes of subsection (4) it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent. Before we look at when the notice to leave was actually sent to the tenant, 31 days after the 24 June 2019 is indeed the 25 July 2019, the date given on this notice. If the notice to leave had been sent to the tenant on the same date the notice to leave was signed, the notice to leave would have been valid. The notice to leave was however served on the tenant by sheriff officer by depositing on 28 June 2019. If it is deemed to be received 48 hours after it is sent in terms of s62(5) it would not be 'received' until 30 June 2019. The landlord would therefore not be able to proceed to the tribunal until 29 July 2019. The date of 25 July 2019 given in this notice is 4 days short.
11. There is a further problem with the notice to leave. The tenancy agreement provides for service of the notice to leave to be by email whereas sheriff officers have been used instead.
12. I have considered whether these two issues mean that the notice to leave is invalid and whether the errors are minor errors which can be rectified by s73 of the Act which provides:

73 Minor errors in documents

- (1) An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document.
- (2) This section applies to—
 - (a) a notice under section 14(3), 16(3)(c), 22(1) or 61(1),
 - (b) the document by which a referral is made to a rent officer under section 24(1),
 - (c) the document by which an application is made to a rent officer under section 42(1), and
 - (d) a notice to leave (as defined by section 62(1)).

13. I consider that the error regarding the 28 days' notice is fundamental rather than a minor. The tenant has not been given the minimum statutory notice of 28 days as required by s54 of the Act.

Service by sheriff officer rather than emails more difficult to assess without having more information. Some tenants may have periods of time away from home. It is arguable that most have access to their emails even if they are not at home to receive their post and if the agreement provides for email service of the notice to leave this should have been done. In any event the lack of notice is a fundamental error which leads me to reject this application.

14. Rule 8(1)(a) of the Rules allows an application to be rejected by the Chamber President if ***“they consider that an application is vexatious or frivolous”***.

15. “Frivolous” in the context of legal proceedings is defined by Lord Justice Bingham in R-v- North West Suffolk (Mildenhall Magistrates Court (1998) Env.L.R.9. At page 16 he states:- “What the expression means in this context is, in my view, that the court considers the application to be futile , misconceived, hopeless or academic”.

16. I consider that this application is hopeless and has no reasonable prospect of success for the reasons given above. Further, in terms of Rule 8(c) of the rules I have good reason to consider that it would not be appropriate to accept this application. There is a fundamental defect with the notice to leave. The application would have no reasonable prospects of success.

NOTE: What you should do now.

If you accept this decision there is no need to reply.

If you disagree with this decision you should note the following:

An applicant aggrieved by this decision of the Chamber President or any legal member acting under delegated powers may appeal to the Upper tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must seek permission to appeal within 30 days of the date the decision was sent them. Information about the appeal procedure can be forwarded on request.

Lesley Anne Ward

Legal Member